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EXTRA-TERRITORIAL INHERITANCE TAXATION

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."[1] For this there is a reason. Taxation involves compulsion. Where there is a tax, there is a tax-gatherer. This unwelcome functionary must have something within his reach to lay hold of, or he cannot collect his tax. He must be able to wield control over some economic interest that he can turn into cash or over some person whom he can make uncomfortable if a command to produce cash is not complied with. For the collection of taxes, might marks the outside limits of any effective right. What Mr. Justice Holmes has said about law in general applies, *mutatis mutandis*, to the law of taxation. In holding that a statute

[1]Mr. Justice Field in State Tax on Foreign-held Bonds (1872) 15 Wall. (82 U. S.) 300, 319. The learned justice went on to say: "These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." From this it would appear that inheritance taxation must be regarded as taxation either of persons or of property, as we do not normally think of inheriting money as a business. As we shall see, however, the Supreme Court has in effect likened taxes on inheritances as taxes on business by regarding them as taxes on transfers. It has also put them in a wholly new category by calling them taxes on a privilege. It has been zealous to affirm that they are not taxes on persons or taxes on property. Nevertheless common sense invites us to inquire whether, from the standpoint of jurisdiction, inheritance taxes are not a form of personal or of property taxation.

cannot be violated by acts in another jurisdiction which are lawful there, this really learned judge says:

> "Law is a statement of the circumstances in which public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power would hardly be called law in the ordinary sense."[2]

In wielding the taxing power, therefore, might is essential to right. Whether might makes right is another matter. In a completely sovereign state, it may easily do so: the taxing power need have no other limits than those of physical capacity. But in a state that is not completely sovereign, right may be subjected to further limitations than those of might. So, too, a completely sovereign state may limit its legislative agents so that might and right are not coterminous. To approach the concrete, the due-process clause of the Fourteenth Amendment of the Constitution of the United States may confine the taxing power of the component states to more restricted bounds than those of physical capacity. The due-process clauses of the several state constitutions may impose similar constraints on the legislative power of those subordinate jurisdictions. Subjects of taxation which are within the physical power of the states may be held by the courts to be without their constitutional power. The direct object of our due-process clauses is to subject governmental action to other tests than those of physical power,—to establish a difference between "can" and "may." Without such a difference, constitutional limitations are surplusage.

The Supreme Court of the United States has established that the requirements of due process of law set other limitations to the taxing power of the states than those of physical incapacity to collect the tax. It has discerned that a tax which purports to be on a subject formally within the jurisdiction of the state may be in substance on some other subject without that jurisdiction. It has appreciated that on occasion it must regard as of controlling importance, not the legal *res* which the state has named as the object of its grasp, but the measure by which the amount of its exaction is determined. So it has held that a domestic corporation cannot

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[2]American Banana Co. *v.* United Fruit Co. (1909) 213 U. S. 347, 356-357, 29 Sup. Ct. 511.

be taxed on chattels permanently located without the state.[3] It has decided that a tax which professes to be on a privilege within the power of the state to grant or to withhold may, by reason of the mode of its assessment, be in substance a tax on property without the state and therefore a trespass on fields which the state may not constitutionally enter.[4]

These decisions represent a modification and probably a reversal of former well established doctrine. They made new law. Though they did not relate to inheritance taxation, they raise the question whether the doctrine they embody does not apply with equal force to inheritance taxation. To pass judgment on this qestion it will be necessary to go behind the doctrine and discover what practical considerations moved the Supreme Court to select it for the particular use to which it has been put. For there is a counter doctrine that the Supreme Court cherishes from time to time and puts to other uses.[5] If it picks now one, and now another, plainly something else than logic determines the choice. The issue, then, is whether common sense and considerations of what is fair and desirable should not move the court to pick for inheritance taxation the doctrine that state power over a person or over a privilege cannot be so wielded as to impose taxes which are in substance levies on extra-state property. In considering this issue, it is important to have in mind the pronouncements of the Supreme Court as to the characteristics of inheritance taxes and the conditions which underlie and justify their imposition.

I Theoretical Aspects of Inheritance Taxation

State inheritance taxes first came before the Supreme Court some time before the Civil War bequeathed to us the Fourteenth

[3]Union Refrigerator Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 26 Sup. Ct. 36.

[4]Western Union Telegraph Co. *v.* Kansas (1910) 216 U. S. 1, 30 Sup. Ct. 190; Ludwig *v.* Western Union Telegraph Co. (1910) 216 U. S. 146, 30 Sup. Ct. 280; Pullman Co. *v.* Kansas (1910) 216 U. S. 56, 30 Sup. Ct. 232; Atchison, T. & S. Ry. *v.* O'Connor (1912) 223 U. S. 280, 32 Sup. Ct. 216; Looney *v.* Crane Co. (1917) 245 U. S. 178, 38 Sup. Ct. 85; International Paper Co. *v.* Massachusetts (1918) 246 U. S. 135, 38 Sup. Ct. 292; Locomobile Co. of America *v.* Massachusetts (1918) 246 U. S. 146, 38 Sup. Ct. 298.

[5]Kansas City, M. & B. Ry. *v.* Stiles (1916) 242 U. S. 111, 37 Sup. Ct. 58, holding that an excise on the privilege of being a domestic corporation, imposed under a law in force at the time the corporation is chartered, may be measured by the total capital stock of the corporation. See also Flint *v.* Stone Tracy Co. (1911) 220 U. S. 107, 162-165, 31 Sup. Ct. 342, holding that the federal excise tax on doing business in corporate form may be measured by income from state and municipal securities.

Amendment. In *Mager* v. *Grima,*[6] decided in 1850, the parties disputed the constitutionality of a statute of Louisiana imposing a tax of ten per cent. on legacies when the legatee is neither a citizen of the United States nor domiciled in Louisiana. The complaint against the tax was that it was a regulation of foreign commerce and a tax on exports. Chief Justice Taney answered that it had nothing to do with commerce or with exports. With reference to the power of the state over property within its borders, he said:

> "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union, at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."[7]

The same Louisiana statute came before the Supreme Court in two other cases during the same decade. *Prevost* v. *Greneaux*[8] held that where the rights of a French subject to Louisiana property vested before the treaty with France, that treaty had no application to the inheritance tax imposed by Louisiana, even though the proceedings for obtaining the property were subsequent to the treaty. *Frederickson* v. *Louisiana,*[9] had to do with an alleged conflict of the Louisiana statute with a treaty with Wurtemberg. In an opinion by Mr. Justice Campbell, the treaty was held not to apply, since it referred to citizens of Wurtemberg leaving property in the United States and not to citizens of the United States leaving property to citizens of Wurtemberg, which was the case before the court. In neither of these cases, did the Supreme Court discuss the theory of inheritance taxation.

[6](1850) 8 How. (49 U. S.) 490.

[7]*Ibid.,* at pp. 493-494.

[8](1857) 19 How. (60 U. S.) 1.

[9](1860) 23 How. (64 U. S.) 445.

Meanwhile, in 1855, *Carpenter* v. *Pennsylvania*[10] passed upon a statute of Pennsylvania applying to the estates of resident decedents. The collateral inheritance tax of 1826 applied only to inheritances "being within this Commonwealth."[11] In 1850 an explanatory act provided that the words "being within this Commonwealth" shall be "so construed as to relate to all persons who have been at the time of their decease, or now may be, domiciled within this commonwealth, as well as to their estates."[12] William Short, a citizen of Pennsylvania, died a few months prior to the Act of 1850, leaving "securities, stocks, loans and evidences of debt and property * * * not within the commonwealth."[13] The tax was held properly "assessed upon the entire personal estate, without reference to its locality."[14] In the opinion of the court, Mr. Justice Campbell stated that the "validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied."[15] The only complaint was directed against the retroactive operation of the law. This was declared specifically not to offend the *ex post facto* clause, and the objection based on the obligation-of-contracts clause was inferentially denied. The court conceded that it "is in some sense true that the rights of donees under a will are vested at the death of the testator", but went on to say:

"But, until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil, as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority, to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period

[10](1855) 17 How. (58 U. S.) 456.

[11]*Ibid.*, at p. 461.

[12]*Ibid.*

[13]*Ibid.*

[14]*Ibid.*

[15]*Ibid.*, at p. 462.

of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it."[16]

This, it is to be remembered, was before the Fourteenth Amendment,[17] and after the period when the Supreme Court under Marshall was astute to extend the ægis of the Constitution to complaints against state action. Moreover, there is nothing to show that any of the property located without Pennsylvania was tangible.[18] Nevertheless, the opinion is important for its emphasis on the fact that the courts of the domicil of the testator make the distribution of the total personal estate, and that all other jurisdictions refer to the place of the domicil.

Passing over *Scholey* v. *Rew*,[19] which held that the federal inheritance tax was an excise and not a direct tax, and *United States* v. *Fox*,[20] which decided that a statute of New York prohibiting devises of lands to certain corporations could be constitutionally applied to a devise of land to the United States, the next case in which the Supreme Court had occasion to discuss inheritance taxation was *United States* v. *Perkins*,[21] decided in 1896. This held that a state may tax a legacy to the United

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[16]*Ibid.*, at pp. 462-463.

[17]In 1902, however, Carpenter *v.* Pennsylvania was quoted with approval. See Orr *v.* Gilman, p. 15, *infra.*

[18]All that is stated as to the character of the property is the following: "In that settlement, the executor represented that a portion of the estate, consisting of securities, stocks, loans and evidences of debt and property, was not within the commonwealth . . ." 17 How., at p. 461.

[19](1875) 23 Wall. (90 U. S.) 331. In the opinion, Mr. Justice Clifford said: "Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy." *Ibid.*, at pp. 347-348. This was said twenty years before Pollock *v.* Farmers Loan & Trust Co. (1895) 157 U. S. 429, 15 Sup. Ct. 673; 158 U. S. 601, 15 Sup. Ct. 912, modified and restricted the formerly well established doctrine that a tax on income is not a direct tax. But in Knowlton *v.* Moore (1900) 178 U. S. 41, 78-83, 20 Sup. Ct. 747, *infra*, pp. 11, 12, Scholey *v.* Rew was reaffirmed and it was declared that it was not affected by the Pollock case.

[20](1877) 94 U. S. 315. In this case Mr. Justice Field, at pp. 320-321, declared: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. . . . Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all."

[21](1896) 163 U. S. 625, 16 Sup. Ct. 1073.

States. The case involved personal property of a domiciled decedent. Nothing is said as to the location of the property. After a review of the statutory origin of the right to dispose of property by will and the restrictions prevailing in the Code Napoleon and in the law of Italy, Mr. Justice Brown proceeds:

"Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."[22]

Later the learned justice adds:

"That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States. *Re Swift's Estate*, 137 N. Y. 77, in which it is said, page 85, that 'the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons.' "[23]

[22]*Ibid.*, at p. 628.

[23]*Ibid.*, at p. 629. In further support of the decision, Mr. Justice Brown, at p. 630, observed: "We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

This passage is quoted by Judge A. N. Hand in the opinion in Prentiss *v.* Eisner (1919) 260 Fed. 589 (D. C. S. D. N. Y.) which held that the provision in the Federal Income Tax of October 3, 1913 (38 Stat. 167, c. 16)

This was the first inheritance tax case which found the Supreme Court divided in opinion. Mr. Justice Harlan was unable to agree, but he did not tell why. In *Magoun* v. *Illinois Trust & Savings Bank*[24] there was also dissent. The questions here in issue related to the propriety of the varying rates imposed on different classes of legatees. Mr. Justice Brewer, who dissented, approved of different rates for legacies to those closely related to the testator, to those remotely related, and to strangers, respectively; but he insisted that it was a denial of equal protection of the laws to increase the rates on legacies to strangers as the amount of the legacy increased. He thought progressive inheritance taxation unconstitutional. In support of his objections, he observed:

"It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon the succession it is held that a different rule prevails. The argument is that because the State may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose

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which allows deduction of "all national, state, county, school, and municipal taxes paid within the year, not including those assessed against local benefits" did not embrace a tax paid upon a legacy or distributive share of the estate of a New York decedent. It was recognized that "the language of the act would apparently make the transfer taxes a necessary deduction, if they are charges against the person receiving the property, or against either the property or the right accruing to him" (260 Fed., at p. 590). The difficulty was avoided by saying that "the tax cannot properly be regarded as an imposition upon either the property or the right to receive a gross amount of the property of the decedent represented by a legacy, devise, or distributive share, but that the property and the right to receive it passed, reduced by the amount of the tax measured by a percentage of the value of the gross share" (*Ibid.*, p. 591). Earlier Judge Hand observed: "I do not think it follows, because the right to transmit or the right to receive the property of a decedent is a privilege granted by the State, and not a common right, that the tax is imposed upon either right" (*Ibid.*, p. 590).

Readers of the opinions reviewed in this article will sympathize with Judge Hand's avowal that "it is impossible to reconcile the conflicting expressions in judicial opinions" and his comment that "the cases are extremely confused and their reasoning is unsatisfactory." The pressure of the endeavor to reach desirable results makes a chameleon out of an inheritance tax. Judge Hand's opinion indicates the part played by policy in his decision when it refers to the importance of the fact that the property passing by inheritance is treated by the federal income tax law as capital and not income and says that "under these circumstances, it would seem inconsistent if charges against this capital, which accrued prior to, or simultaneously with, the devolution of it, could be deducted from income tax returns" (*Ibid.*, p. 590). The opinion refrains from elaborating a positive theory of the inheritance tax, but by saying that the only natural way is to treat the legatee as the recipient of a net amount, it appears to approve the contention of the government that "these taxes are an appropriation by the State of a portion of the decedent's estate before the remainder vests in the legatee" (*Ibid.*, p. 589).

[24](1898) 170 U. S. 283, 18 Sup. Ct. 594.

them in any manner it chooses. There are doubtless some matters over which the State has purely arbitrary power. For instance, it is under no obligation to grant any charters, and the legislature may undoubtedly in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burdens he pleases. But I do not understand that legacies and inheritances stand upon the same footing. True, the State may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy."[25]

To establish that the power over inheritances is not arbitrary, the learned Justice referred to hypothetical cases adduced by counsel for appellant, which he assumed all would agree to be unconstitutional. These included statutes providing that the property of every Illinois decedent should be given to the members of the legislature, or that the property of *A* should pass to the state, that of *B* to a charitable corporation, and that of *C* to his children. "But whatever may be the power of the legislature," continued Mr. Justice Brewer, "Illinois has regulated the matter of descents and distribution and has granted the right of testamentary disposition."[26] The argument here seems to be that power to prohibit does not carry with it power to burden as the state pleases in cases where power to prohibit is not exercised, or that complete prohibition and conditional prohibition are not identical. As we shall see later, the logic of these contentions has been subsequently recognized by the Supreme Court. The majority opinion in the Magoun case added nothing to the theory of inheritance taxation. Mr. Justice McKenna reviewed the precedents and summed them up by saying:

"They are based on two principles: 1. An inheritance tax is not on property, but one on succession. 2. The right to take property by devise or by descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."[27]

The next three cases to be considered were all decided on May 14, 1900. *Plummer* v. *Coler*[28] held that a state could tax

[25] *Ibid.*, at p. 302.
[26] *Ibid.*, at p. 303.
[27] *Ibid.*, at p. 288.
[28] (1900) 178 U. S. 115, 20 Sup. Ct. 829. Mr. Justice White dissents.

a legacy consisting of United States bonds, although the bonds were issued under a statute declaring them to be exempt from state taxation in any form. The reason given was that the inheritance tax was not on the property passing by inheritance but upon the right or privilege to take property by will or by descent. This right or privilege seemed to be thought of as indulgences by the state in favor both of the deceased and of surviving heirs or legatees. "For, after all," queries Mr. Justice Shiras, "what is an inheritance tax but a debt exacted by the State for protection afforded during the life-time of the decedent?"[29] And he adds: "It is often impracticable to secure from living persons their fair share of contribution to maintain the administration of the state, and such laws seem intended to enable to secure such payment from the estate of the citizen when his final account is settled with the state."[30] Earlier the opinion refers with seeming approval to the principle developed by the Pennsylvania courts that "what is called a collateral inheritance tax is a bonus, exacted from the collateral kindred and others, as the conditions on which they may be admitted to take the estate left by a deceased relative or testator."[31]

For our present purpose the most significant point in the opinion in *Plummer* v. *Coler*[32] is the reliance placed upon the decisions holding that taxes on corporate franchises may be measured by reference to property not in itself taxable. In answer to the contention that there is a difference between the individual and the corporation because the former exists and carries on his operations under natural power, while the latter is dependent for its existence upon the state, and therefore subject to impositions not at all applicable to natural persons, Mr. Justice Shiras says:

"Without undertaking to go beyond what has already been decided by this court in *Mager* v. *Grima,* 8 How. 490, in *Scholey* v. *Rew,* 23 Wall. 331, and in *United States* v. *Perkins,* 163 U. S. 625, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee, or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the state, and we are unable to perceive any sound

[29] *Ibid.*, at p. 138.

[30] *Ibid.*, at p. 138.

[31] *Ibid.*, at p. 121.

[32] *Ibid.*

distinction that can be drawn between the power of the state in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."[33]

This identification of state power over corporate franchises and over the descent of property will be seen to be most important when we consider the changes that have taken place since 1910 in the attitude of the court towards the taxation of corporate franchises.

All of the opinions reviewed thus far, with the exception of that in *Scholey* v. *Rew*,[34] have dealt with state taxation of inheritances. Obviously the theory that such taxation is justified because of the power of the state to control the transfer of the property of the dead cannot be adduced in support of inheritance taxation by the national government. Hence on this same May 14, 1900, when the Supreme Court in *Knowlton* v. *Moore*[35] sustained the federal inheritance tax of 1898, a different analysis of inheritance taxation was propounded. The tax is still regarded as not one on property, but the idea that it is one on a privilege becomes faint. The conception broadens. "Confusion of thought may arise," says Mr. Justice White, "unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."[36] The description of such taxes as levied on a privilege "may also produce misconception, unless the import of those words be accurately understood."[37] Some way had to be found to meet the objection that a federal tax upon what had previously been called a privilege granted by the state was an interference with the power of the state to determine the extent of that privilege. So it is said that "the thing forming the universal subject of taxation, upon which inheritance and legacy taxes rest,

[33] *Ibid.*, at p. 137.

[34] (1875) 23 Wall. (90 U. S.) 331.

[35] (1900) 178 U. S. 41, 20 Sup. Ct. 747. Mr. Justice Brewer dissented from that part of the opinion holding that a progressive rate of tax can be validly imposed. Justices Harlan and McKenna dissented on the interpretation of the statute, being of opinion that Congress meant to base the progression of rates on the whole amount of personal property in the decedent's estate rather than on the amount of the respective legacies.

[36] *Ibid.*, at p. 57.

[37] *Ibid.*

is the transmission or receipt, and not the right existing to regulate."[38] Though the tax diminishes the value of the right to inherit or receive, "this is a burden cast upon the recipient, and not upon the power of the state to regulate."[39]

There is of course no inconsistency between the theory that a state inheritance tax is a price exacted for a privilege and the theory that a federal inheritance tax is an excise on an event or on an acquisition. The identical situation may have different aspects, and state power may be predicated on one and national power on another. But the ease with which the court can find a theory to suit its purpose tempts one to question whether any theory can have the inherent compelling power with which judges and men are wont to endow it. At any rate, where there is a choice of theories, there is a choice of results. The theory formerly postulated with respect to state power over corporate franchises has of late been modified from considerations of what seemed desirable as a matter of policy.[40] The theory as to state power over corporate privileges had previously been identified with the theory as to state power over the privilege of inheritance. If one has since cracked, why not the other also? If absolutism has been dethroned in one place, why should it not be dethroned in another? Why not the emancipation of oppressed legatees as well of oppressed corporations? The furthest that Mr. Justice Shiras ventured to go in *Plummer* v. *Coler*[41] was that state power to tax inheritances was not less than state power to tax corporate privileges. Now that the latter has been limited, the question inevitably arises whether the former should not be also.

The theory set forth by Mr. Justice White in *Knowlton* v. *Moore*[42] to answer the objection that a federal inheritance tax is an interference with the control of the states over the privilege of inheriting was regarded by him as sufficient also to justify progressive rates.[43] But he could not accept the position that the dis-

[38]*Ibid.*, at p. 59.

[39]*Ibid.*, at p. 60.

[40]Cases cited *supra*, footnote 4.

[41](1900) 178 U. S. 115, 20 Sup. Ct. 829, *supra*, p. 9.

[42](1900) 178 U. S. 41, 20 Sup. Ct. 747, *supra*, p. 11.

[43]So far as the opinion of the court discloses, the complaint against the progressive feature of the tax was based, not on the due-process clause of the Fifth Amendment, but on the requirement of section 8, article 1 of the Constitution which provided that "duties, imposts and excises shall be uniform throughout the United States", and on general principles of

tinction between a tax on the property and one on the privilege of inheriting it afforded warrant for a state tax on a legacy of United States bonds. So he dissented in *Plummer* v. *Coler,*[44] but without filing an opinion. He must have thought that the effect of a tax on the privilege of inheriting United States bonds was, when measured by the value of the bonds, the same as that of a tax on the bonds themselves. When it came to state interferences with the federal borrowing power, Mr. Justice White was not content to take formal distinctions at their face value. We must all agree that at the moment a tax on the privilege of inheriting United States bonds hurts the federal government as much as a tax on the bonds. But an inheritance tax does not repeat every year, like a property tax; and that makes quite a difference. Though the difference would diminish as the rate of the inheritance tax approached one hundred per cent., this theoretic possibility may well be neglected until it bids fair to become an actuality. In addition to this consideration, it may be observed that the exemption of United States bonds from burdens which competing securities must bear confers a bounty on the federal borrowing power, so that a court has good reason to confine that bounty to property taxation and to accept even poor reasons for not extending it further.

The third of the cases decided on May 14, 1900, was *Murdock* v. *Ward,*[45] which allowed a federal inheritance tax to reap revenue

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equality inhering in free government. The uniformity provision was held to prescribe only geographical and not intrinsic uniformity. The argument as to the enormity of the tax was declared to be without merit and to have been disposed of in Magoun *v.* Illinois Trust & Savings Bank (1898) 170 U. S. 283, 18 Sup. Ct. 594. Somewhat enigmatically, Mr. Justice White observed: "If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so" (1900) 178 U. S. 41, 109-110.

If we assume that something in the Federal Constitution or out of it limits the rates which Congress may impose on inheritances and legacies, Mr. Justice White was hardly warranted in referring to the Magoun case for support of progressive and unequal inheritance taxation by the federal government. For the Magoun case rested on the theory that state taxation of inheritances is on the privilege to transmit or to inherit. As Mr. Justice McKenna said in that case: "The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance." (1898) 170 U. S. 283, 300. This theory is not applicable to federal inheritance taxation.

[44](1900) 178 U. S. 115, 20 Sup. Ct. 829, *supra,* p. 9.

[45](1900) 178 U. S. 139, 20 Sup. Ct. 775.

from a legacy of United States bonds, notwithstanding a provision in the statute under which the bonds were issued that they were exempt from federal taxation. Here, too, Mr. Justice White dissented without announcing his reasons. Of course if the privilege theory did not seem to him sufficient for overlooking the character of the property passing by inheritance, the transfer theory could do no better. The question in the case was whether it could do as well. Mr. Justice Shiras, who wrote the opinion, added little to what he had said in *Plummer* v. *Coler*.[46] He assumed that one case followed from the other.[47] Such an assumption seems reasonable, notwithstanding the difference in the grounds on which state and national inheritance taxes are supported. Had the court felt any difficulty in distinguishing between a tax on the inheriting of United States bonds and a tax on the bonds, it must feel the same difficulty in distinguishing between a tax on the right to inherit and a tax on the bonds. For no power of a state over the right to inherit or over anything else can be so great as to warrant a tax which the court regards as one on the federal borrowing power. A tax on United States bonds is held to be a tax on the federal borrowing power. Certainly a tax has the same effect on that borrowing power, and the same relation to a promise of exemp-

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[46]*Supra*, footnote 44.

[47]"If a state inheritance law can validly impose a tax measured by the amount or value of the legacy, even if that amount includes United States bonds, the reasoning that justifies such a conclusion must, when applied to the case of a Federal inheritance law taxing the very same legacy, bring us to the same conclusion." *Ibid.*, at p. 147. Earlier in the opinion Mr. Justice Shiras had answered the argument that in the Plummer case "we were dealing with the sovereign power of a state to tax property within her own limits" (*Ibid.*, at p. 146) by saying that that case nevertheless involved the conclusion that "the inheritance or legacy tax law of the state of New York did not expressly, or by necessary implication, propose to tax Federal securities; that the tax was not imposed on the property passing under the state laws, but on the right of transfer by will or under the intestate law of the state." (*Ibid.*) This of course does not establish the parallelism between the two cases, since Plummer *v.* Coler might have needed for its support, not only the ground that the tax was not formally on the federal securities, but the further one that the effect of the tax on the national government might be neglected because the state power to forbid inheritances altogether gave it in this particular respect a position of superiority over the national government. What Murdock *v.* Ward in effect decides is that the first ground alone was sufficient. The second ground seems quite untenable. It would warp all established ideas of the federal system to exalt the states to the extent of allowing them to interpose positive impediments in the way of the exercise of national functions. This may appear to be contradicted by United States *v.* Fox (1877) 94 U. S. 315, *supra*, p. 6, and Snyder *v.* Bettman (1903) 190 U. S. 249, 23 Sup. Ct. 803, *infra*, p. 16, but there is room for a distinction between the power of the United States to borrow and its opportunity to receive bequests and devises.

tion, whether it is called a tax on the right to inherit or on the inheriting. Once therefore the Supreme Court has accepted the theory that a tax on the right to inherit United States bonds is not a tax on the bonds, it can find no substantial reason for rejecting a similar distinction between a tax on the inheriting and one on the bonds.[48]

Mr. Justice Shiras was also the author of the opinion in *Orr* v. *Gilman*,[49] decided a year and a half after the three cases just reviewed. This held that the New York transfer tax might apply to a testamentary exercise of a power of appointment although the donor of the power had died before the passage of the statute imposing the tax. The theory that those who benefit from the exercise of the power take from the donor of the power rather than from the donee was not regarded as sufficient to obscure the fact that "in reality and substance, it is the execution of the power that gives to the grantee the property passing under it."[50] Here again it was reiterated that what was being taxed was the succession and not the property itself, and it was held that in assessing the tax, account could be taken of securities exempt from taxation by statute, without offending the obligation-of-contracts clause. The important part of the opinion for our present purpose is its discussion of *Carpenter* v. *Pennsylvania*[51] decided in 1855. After an extended quotation from Mr. Justice Campbell's opinion in that case, Mr. Justice Shiras proceeded:

"It is true that this case was decided before the adoption of the Fourteenth Amendment, but we think it correctly defines the limits of jurisdiction between the state and Federal governments in respect to the control of the estates of decedents, both as they were regarded before and have been regarded since the adoption of the Fourteenth Amendment. It has never been held that it was the purpose or function of that amendment to change the systems

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[48]In this connection note should be taken of Cleveland Trust Co. *v.* Lander (1902) 184 U. S. 111, 22 Sup. Ct. 394, holding that shareholders in corporations cannot reduce the assessment of their shares for state taxation by such part of their value as is contributed by United States bonds owned by the corporation. This decision might conceivably have been rested on some arbitrary state power over the existence of the corporation, but it went on the broader ground that a tax on the interest of the shareholder is not a tax on the property owned by the corporation.

[49](1902) 183 U. S. 278, 22 Sup. Ct. 213. Mr. Justice Harlan confined his concurrence to the result.

[50]*Ibid.*, at p. 283.

[51](1885) 17 How. (58 U. S.) 456, *supra*, p. 5.

and policies of the States in regard to the devolution of estates, or to the extent of the taxing power over them."[52]

From this it might be inferred that the due-process clause of the Fourteenth Amendment does not limit state power over inheritance taxation. But clearly the most that Mr. Justice Shiras can mean is that the Amendment does not limit the power of the state over inheritances within its jurisdiction. Earlier and later cases have given consideration to due-process complaints against state inheritance taxes, and there can be no question that a justiciable issue is raised by appeal to the Fourteenth Amendment. The nature and extent of the restrictions which the Amendment imposes is of course another matter.

With respect to the federal tax on a legacy to a municipal corporation which was sustained in *Snyder* v. *Bettman*,[53] the Supreme Court had more difficulty. Here Mr. Justice White found companionship in dissent. He filed a dissenting opinion in which Chief Justice Fuller and Mr. Justice Peckham concurred. In this he quoted from his opinion in *Knowlton* v. *Moore*[54] the statement that "a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but *this is a burden cast upon the recipient,* and not upon the power of the State to regulate."[55] Being a burden on the recipient, which in this case was an instrumentality of the state, the tax must be invalid under the principle found to be inherent in the federal system created by the Constitution that neither the states nor the nation may exercise their governmental powers upon the governmental powers of the other. When confronted with *United States* v. *Perkins*[56] which allowed a state to tax a legacy to the United States, Mr. Justice White insisted that this case "rested not simply on the authority of the State to impose an inheritance tax, but upon its admitted right to regulate the transmission or receipt of property by death."[57] This right to regulate, the United States does not have. With not a little plausibility, Mr. Justice White sug-

[52](1902) 183 U. S. 278, 286.

[53](1903) 190 U. S. 249, 23 Sup. Ct. 803.

[54](1900) 178 U. S. 41, 20 Sup. Ct. 747, *supra*, p. 11.

[55](1903) 190 U. S. 249, 258, 23 Sup. Ct. 803. Quoted from (1900) 178 U. S. 41, 60. The italics are those of Mr. Justice White in his opinion in Snyder *v.* Bettman.

[56](1896) 163 U. S. 625, 16 Sup Ct. 1073, *supra*, p. 6.

[57](1903) 190 U. S. 249, 256, 23 Sup. Ct. 803.

gested that "there is no room in reason * * * for the assumption that things which are different are nevertheless one and the same."[58] Doubtless the learned justice had *United States* v. *Fox*[59] in mind when he continued:

"Certainly, I assume, it cannot be said because a State has the right to regulate successions and, therefore, to prevent property from passing by death to the United States, hence also the United States must have power by regulating successions to prevent property from passing by death to a State or its governmental agencies. And yet, in my opinion, this is the logical consequence of the doctrine that because the States may in virtue of an authority belonging to them accomplish a particular result as regards the United States, therefore the United States must have the right to bring about the same thing as to the States. The United States not possessing, as the States do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution. When, on the contrary, the State imposes a burden upon the passage or receipt of property by death, its right to do so, if not sustainable by the exercise of the taxing power, finds adequate support in the authority vested in it to regulate the transmission or receipt of property on the occasion of death."[60]

The objections of the dissenters were none too well answered in Mr. Justice Brown's opinion for the majority, though arguments that did not go to the root of the matter were satisfactorily dismissed. The suggestion that Congress could not tax matters which are regulated by the states was found to be controverted by the approved practice of imposing stamp taxes on conveyances and occupation taxes on "the profession of a lawyer or physician, or the business of dealing in spiritous liquors, for which licenses are required under the laws of nearly all the States."[61] So, too, it was shown that if the right to impose inheritance taxes arises solely from the right to regulate successions, a denial of such a right to the national government goes to the whole power to impose a succession tax irrespective of the legal characteristics of the legatee. But no good answer was given to the major contention on behalf of the city that power to intercept money going to the instrumentality of a state government needs further justification than the

[58]*Ibid.*, at p. 257.

[59](1877) 94 U. S. 315, *supra*, p.

[60](1903) 190 U. S. 249, 257, 23 Sup. Ct. 803.

[61]*Ibid.*, at p. 253.

mere power to tax. It was certainly not answered by saying that "Congress has the power to tax successions" and "the States have the same power" which "extends to bequests to the United States," and that therefore "it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States or their municipalities."[62]

The trouble with this syllogistic effort is that the state has not only the same power as Congress to tax successions, but has a further power which Congress does not have, and it was this further power which had been found to extend to bequests to the United States. It is not surprising that this lapse prompted Mr. Justice White to reveal to his brethren that things which are different are not one and the same. Equally unfortunate seems to be Mr. Justice Brown's dismissal of his concession that "Congress has no power to impose a burden upon a State or its municipal corporations,"[63] by insisting that the tax in question is "incidental" rather than "direct." In support of this he adduces franchise taxes measured by capital stock which in part represents investment in United States bonds. But those were not taxes that took from the United States every cent that they yielded to the states, as the $22,000 which the United States took from the estate of Mr. Snyder reduced by that much what Springfield, Ohio, received from that gentleman's bounty. Comment seems unnecessary on the further conclusion that "as the tax in the case under consideration is collected from the property while in the hands of the executor, who is required to liquidate it 'before payment and distribution to the legatees,' we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax."[64]

The remaining cases in which the Supreme Court has dealt with inheritance taxes will be reviewed later. Enough ground has been covered to enable us to discern the basis upon which courts rest the power of Congress and of the states to tax inheritances. The subject on which federal inheritance and legacy taxes fall is the transmission and receipt of the inheritance. No right to regulate inheritance gives added strength to the national arm. The fiscal power over inheritances does not differ in extent from the

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[62] *Ibid.*, at p. 254.

[63] *Ibid.*, at p. 253.

[64] *Ibid.*, at p. 254. For a similar artificiality predicated on temporal considerations, see *supra*, footnote 23.

other excise powers of the national government. The states have a similar power, and something more. They have a dormant power to withhold from the living any property whose former owner has joined the dead. For graciously leaving the power dormant, the state may exact its price. It may charge a bonus which may escape the judicial scrutiny bestowed on plain, everyday taxing power. This bonus notion has been availed of to justify state subtractions from legacies to the national government[65] and legacies of United States bonds.[66] It has been offered as the reason why the states may vary their rates of taxation according to the relationship between the deceased and the legatee or to the amount of the property passing.[67] But, strange as it may seem, Congress with nothing but ordinary taxing power may impose progressive rates,[68] and may tax legacies to the political progeny of the states.[69] Undoubtedly it may also tax inheritances consisting of state bonds. No one seems to have thought it worth while to contest the point, but the theory that the tax is not on the property but on its passing, coupled with the Supreme Court's refusal to deduct income from state bonds from the assessment of the excise on doing business in corporate form,[70] make it certain that objection would be futile. Thus in all the cases which have been considered thus far, the bonus theory of the state inheritance tax seems to play no greater rôle than that of a labor-saving device. It has been useful, but not indispensable. It remains to be inquired later whether under any circumstances it can legitimately produce results that no substitute can accomplish.

Meanwhile we may observe that neither the bonus theory nor the transfer theory adds anything to the might of the states or of the United States. Take first the case where property within the United States is sought to be transferred in accordance with the terms of a will probated outside the United States. Since the

[65]United States *v.* Perkins (1896) 163 U. S. 625, 16 Sup. Ct. 1073, *supra*, p. 6.

[66]Plummer *v.* Coler (1900) 178 U. S. 115, 20 Sup. Ct. 829, *supra*, p. 9.

[67]Magoun *v.* Illinois Trust & Savings Bank (1898) 170 U. S. 283, 18 Sup. Ct. 594, *supra*, p. 8. See also, *supra*, footnote 43.

[68]Knowlton *v.* Moore (1900) 178 U. S. 41, 20 Sup. Ct. 747, *supra*, p. 11. See also, *supra*, footnote 43.

[69]Snyder *v.* Bettman (1903) 190 U. S. 249, 23 Sup. Ct. 803, *supra*, p. 16.

[70]Flint *v.* Stone Tracy Co. (1911) 220 U. S. 107, 31 Sup. Ct. 342, *supra*, p. 3. Orr *v.* Gilman (1902) 183 U. S. 278, 22 Sup. Ct. 213, *supra*, p. 15, adds oblique confirmation of the conclusion stated in the text.

property is within the physical control of both the state and the United States, there is as much might to tax the property because of its transfer as to tax its transfer or the privilege of having it transferred. Either the state or the United States can, if not restrained by constitutional limitations, sequester the property and sell it for non-payment of a tax, no matter by what name that tax is called. Neither the state nor the United States could use its physical power over this property as a means of collecting a tax on other property located outside the United States, or on the transfer of such other property or the privilege of having it transferred, unless the persons interested in such outside property preferred to pay the demand rather than to lose the property within the United States. Such power of indirect inducement as the state or the United States might be disposed to exercise could be wielded as effectively by seizing the property as by withholding the privilege of having it transferred.

Suppose, next, the case where the decedent was not domiciled within the United States and none of his property is located here, but a person entitled to the property under some foreign law is present or owns property within the United States. If the foreign property passing by the foreign inheritance is brought to the United States, we have the same situation as in the case where the property is within the United States at the time of the decease of its former owner. If the property is not brought here, the only means of collecting a tax is direct or indirect pressure on the person who by the foreign law has become its owner. If he has tangible property or debtors within this country, there is physical power to collect some or all of the tax. If he is present here, he can be subjected to indignities if the tax is not paid. If by choice or necessity he submits to the indignities and does not pay the tax, it cannot be collected. So if his property here is of less value than the amount of the tax, a part of the tax remains unpaid. But in either case the extent of the physical power is quite independent of the theory or theories advanced to justify its exertion.

The third case is the one in which neither property nor any person interested therein is within the jurisdiction which seeks to impose an inheritance tax, but the testator was domiciled within the jurisdiction at the time of his decease. Let us assume that, in this case, some act within the state in which the decedent was domiciled is necessary to the transfer of the whole or a part of the estate. If the necessary act is the positive intervention of

some state officer, the bonus theory affords a convenient justification for any charge that the state may make on account of that intervention. But the bonus theory does not ensure the collection of a tax. All that any jurisdiction could do towards the actual collection of the tax would be to withhold probate proceedings, or penalize persons participating therein if the required tax is not paid. The United States would have physical power to incarcerate any person who assisted in the probate without assuring the payment of the tax. The threat of this power would usually prevent the probate proceedings and induce interested persons to come forward with the tax as effectively as any state power to withhold the probate could do. This threat would produce the same result whether the tax demanded were called one on the extra-jurisdictional property, the extra-jurisdictional legatee, or on the transfer of the property or the privilege of having it transferred. Neither the state nor the United States would necessarily possess the requisite might to collect the tax. But both would equally enjoy an indirect means of compulsion which would usually induce the payment of the tax.

Thus the bonus theory confers on the state no physical power which the United States does not have on the transfer theory, as the transfer theory adds no physical power to what could be exercised if it had never been thought of. It might perhaps have been as well to assert without elaboration that no theory can ever be the parent of physical power. There is some excuse for the elaboration, however, in the fact that there seems to be found here and there an assumption that somehow these different theories are physically and not merely metaphysically distinguishable—that taxes which under one theory have an extra-territorial incidence have only intra-territorial incidence under another. Manifestly, the tax has the same effect by whatever name it goes. This effect is to keep from legatees or some of them something that they would otherwise receive. In all the cases which come before the courts, the taxing authority has physical power either to collect the tax or to prevent the passing of the legacy if the tax is not paid. Otherwise the case would not arise. The tax collector does not make seizures nor bring suit outside his own bailiwick. At home he does not swing theories to develop his muscle. He gets a lawyer to spin them as aids in persuading a court that what he proposes to do, and can readily do if left alone, is not forbidden by constitutional limitations. The question which these constitutional limita-

tions present to the courts for adjudication is whether the meaning of language or considerations of fairness and public policy permit or forbid the exercise of physical power in the manner and to the extent proposed. Obviously the issues raised by this question are not met by showing that the physical power exists.

The most, then, that any theory can do on behalf of inheritance taxation is to afford justification for exactions that would otherwise appear constitutionally indefensible. In the cases reviewed we have seen theories gallantly serving this cause. The theory that the tax is not one on property has acquitted it of the charge of being a direct tax, has allowed it to be measured by property not itself taxable, and has sanctioned unequal rates on different classes of legatees and progressive rates graduated by the amounts of the legacies. The theory that the tax is not one on the legatee has permitted the states to tax bequests to the United States and the United States to tax bequests to the states. It has proved more important to discover what the tax is not, than to discern what it is. For exactions which, when imposed by the states, are supported as taxes on the privilege of transferring or acquiring property by inheritance are, when imposed by the United States, sanctioned with equal success as taxes on the actual succession. As an ever present help in time of trouble, the transfer theory seems to be nearly, if not quite, as efficient as the bonus theory.

The justifications which these theories have embodied might conceivably have been stated in more matter-of-fact terms. From several standpoints inheritance taxation is readily distinguishable from ordinary personal and property taxation. The differences between them are substantial differences in results. The most striking characteristic of inheritance taxation is that its impact is occasional and spasmodic. Inheritance taxation waits for something to happen. It does not hit persons or property merely because they exist. Its ministrations are offered only in times of bereavement. The infrequency and casuality of inheritance taxes afford considerable and, quite likely, sufficient justification for the tolerance which we have seen extended towards them. This becomes apparent when we fix our attention on the practical issues which have required judicial characterizations of inheritance taxation.

The constitutional requirement that federal direct taxes be laid in proportion to the census[71] was designed to prevent the populous

[71]United States Constitution, article 1, section 9, clause 4: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

states from unduly shifting burdens to richer neighbors. It in effect divided the burdens of some kinds of taxation among the states in proportion to their population rather than to their wealth. But other taxes were subjected only to the rule of uniformity,[72] which has been interpreted to mean geographical uniformity.[73] If something occurring in one place is taxed, the same thing occurring in other places must be taxed in like manner. Some discrepancies between voting power and liability to taxation were sanctioned; others were forbidden. It is plain that the Supreme Court, by holding an inheritance tax to be an excise and not a direct tax, sanctioned no such lack of reciprocity between ballots and burdens as would have ensued from a corresponding classification of capitation taxes and taxes on land. For these latter exactions recur annually on the same persons and property. Inheritance taxes come only every now and then. The annual recurrence of an income tax may well have been the most substantial reason why a majority of the Supreme Court felt constrained to abandon the doctrine of *Springer* v. *United States*[74] that an income tax is not a direct tax and to declare in *Pollock* v. *Farmers' Loan & Trust Co.*[75] that the nature of an income tax depends upon the nature of the source of the income. Much as the Pollock case has been criticised, there is strength in the contention that this criticism and the recall of the decision by the Sixteenth Amendment reflect a reversal of the views of policy entertained by The Fathers rather than a keen regard for them. When the federal income tax was first called indirect by the Supreme Court, it was more of an unusual levy in time of special stress than a perennial fiscal expedient. Inheritance taxes may be perennial on the statute books; but in operation they are intermittent and fortuitous.

The same considerations apply to progressive rates and to taxes which are alleged to interfere with the appointed place of the states or of the nation in the federal system. Subtractions from occasional bequests to the states or to the United States are puny threats against their independence when compared with taxes

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[72]United States Constitution, article 1, section 8, clause 1: "The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

[73]Knowlton *v.* Moore (1900) 178 U. S. 41, 20 Sup. Ct. 747, *supra*, p. 23.

[74](1880) 102 U. S. 586.

[75](1895) 157 U. S. 429, 15 Sup. Ct. 673.

which in any way interfere with their respective taxing or borrowing powers. These borrowing powers are much less affected by inclusion of public securities in the assessment of an inheritance tax than in the computation of income or property taxes. And progressive rates of taxation on inheritances offer much less of a menace to the institution of private property than that to which it would be exposed by progressive rates of taxation on property. Even if progressive income taxation had been held constitutionally indefensible, practical consistency would not require the condemnation of progressive inheritance taxation. The condonation of the former must extend *a fortiori* to the latter.

Thus we find that the work which we have seen done by these theories of inheritance taxation may be approved on its own merits, however much we may be inclined to criticise artificialities in the theories. It may, however, seem wise to scrutinize the theories more carefully when they claim to offer solutions for the question whether the state or the United States is in effect poaching on preserves beyond the limits of its territorial jurisdiction. Obviously the same theoretical formulation may be applied with equal verbal authority to two different situations, although one application may have substantial practical justifications which the other wholly lacks. One application may "immolate Truth, Justice, and the Constitution," and another be quite innocent of that grave offence. No theory can wholly escape the test of its fruits. This test is not satisfied by showing that the fruits are the legitimate verbal offspring of the theory. If the fruits are undeniably bad, we may be tempted to inquire into the genesis of the theory. We may discover that it expresses a half truth and not a whole truth, and that what it leaves out of account may be unimportant for some uses and highly important for others. For some purposes it may do well enough to say that a tax is not imposed on a person or on property, even though it is paid by a person or collected by seizing and selling property. For other purposes the denial that a tax is on a person or on property may belie patent facts which should be of controlling significance in any effort to reach a wise solution of the issue before us.

It is especially important to look all the facts straight in the face when we are called upon to pass judgment on the question whether an inheritance tax is guilty of the vice of extra-territoriality. Extra-territorial taxation means the possibility or actuality of double taxation by the action of different taxing

authorities. This possibility has not thus far been present in this story, except perhaps in the case of *Carpenter* v. *Pennsylvania*,[76] where it was not complained of. In a sense, of course, there is double taxation when both a state and the United States tax the same thing. But such double taxation would disappear without soothing the taxpayer, if either the state or the United States took complete control of the functions now exercised by the other. In the existing division of functions, the state and the United States tax for different objects. The only kind of double taxation which this involves is the same as that imposed by taxation of the same property for a state and for a municipal purpose. If the city collects the whole tax and pays a part over to the state treasury, we do not call it double taxation. It is no different when separate levies are made. But a new element is introduced when different states or different countries impose cumulative taxes on the same economic interest. Such an interest may be taxed to pay for Chicago policemen and for United States soldiers with the justification that it has some concern in the efficiency of both. But to tax it for Chicago policemen and for New York policemen as well may require it to contribute to an enterprise to which, from any sensible point of view, it has no relation. Bi-state double taxation gives promise of serious evils—evils which neither state may desire to inflict. A goodly number of these evils flourish under our constitutional system. But a few of them are scotched by the Supreme Court with the club of the due-process clause. The most important of these scotchings are of comparatively recent origin. They were first inflicted after the cases on inheritance taxation which have been here reviewed. If the policy which provoked them applies also to inheritance taxation, the theories adopted to explain them can readily be prevailed upon to play the same part in similar condemnation of extra-territorial inheritance taxation.

The possibility of bi-state double taxation arises because the same economic interest has more than one handle for the taxing power to lay hold of. There are creditor and debtor; corporation and stockholder; source of income and recipient of income; property and owner of property. The two handles which inheritance taxation usually grasps are (1) property or debtors of the deceased and (2) the probate of the will of the deceased at his last earthly domicil. As estates of decedents are now administered, the state of

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[76](1855) 17 How. (58 U. S.) 456. See *supra*, footnote 18.

domicil of the deceased participates in the distribution of personal property not within its borders. Its law is referred to by the jurisdictions where the personal property lies. The active intervention of its officials is in fact instrumental to the distribution of property elsewhere. The theory that inheritance is a privilege means in substance that this active intervention may be withheld. The active intervention of the state where the property is located is also needed. This, too, may be withheld. From the liberties to withhold these respective interventions have been inferred the privileges of coupling a grant of them with any terms that the grantor chooses,—hence the bonus theory of inheritance taxation. The state has something for sale. It may profiteer to its pocket's content. It may vary its price for each customer and fix it on any basis it pleases. Such is the argument. But, as we shall see, the logic is no longer regarded by the Supreme Court as inexorable. In so far as the terms which the state imposes take account of matters over which it has no direct control, the theory might well be called the club theory rather than the bonus theory. The state brandishes a stick and clubs persons into submission. The stick is the power to withhold privileges within the state's control. The brandishing is a warning that the stick will strike unless the threatened victim submits to taxation on subjects without the state's control.

If this club theory is worthy of all acceptation, the state of the domicil of the decedent must of course be permitted to include foreign realty in the measure of its tax, although with such realty its law has nothing to do. So, too, where the only handle of a state or of the United States with which to grasp an inheritance tax is the location of property within its borders, the club theory would permit such a tax to take account of property elsewhere. This kind of extra-territorial taxation, with the possibility of double taxation wherever property of a decedent was not confined to a single jurisdiction, would persist even if the idea of the so-called universal succession were abandoned and wills were probated only where property of the decedent is found. A state which had some but not all of the property in its possession might compute its tax on the subject within its control by some measure which included other subjects without its control. Its total tax would of course have to be less than the value of the property within its borders, for it could not collect anything more than some one was willing to give to get that property. But it might vary its tax on the suc-

cession of property within its borders in accordance with the value of the decedent's property elsewhere. Such a device, it is submitted, is an instrument of extra-territorial taxation, whether we call the tax one on property or on a succession or on the privilege of succession. This extra-territorial taxation may or may not be justified by reason of some more drastic power which the state might have exercised. That is one of the main questions with which this inquiry is to deal. Perhaps some tolerable reasons can be found why a state should be allowed to use its power over property within its borders as a club to coerce tribute from property outside. It must be apparent, however, that discrimination in the taxation of inheritances over which the state has control, based on elements extraneous to that control, raises questions under the equal protection clause of the Fourteenth Amendment which are not necessarily answered by pointing to a power to impose heavier taxation which is not discriminating. Discrimination may be vicious where non-discriminatory prohibition is not. But this is anticipating.

Taxation by the state of domicil of the deceased presents a somewhat different question. Under prevailing methods of administration, the state of domicil plays a part in the regulation of successions to property outside its limits. The circumstance that this is done by the consent and reference of the states where the property is situated cannot obscure the fact that the importance of the action or inaction of the state of domicil is not confined to the assets within its borders. The state of domicil actually enjoys a delegated control over assets outside. It does in fact perform a service not limited to the transmission of property over which it has direct physical power. If, therefore, its fees are measured in part by this extra-state service, this may be justified under the bonus theory without resort to the club theory. The state is not using its power over a part of the inheritance to take toll from another part to which it has no relation. Under the bonus theory its charge may be regarded as being based only on the value of what is actually sold. But this theory can apply only to the tax of the state of domicil. And we may question whether it ought to be recognized even here.

It may assist in that questioning to note that, so far as the question of extra-territoriality is concerned, the bonus theory adds no substantial justifications to those that might be wrought from the transfer theory. If the United States duplicates a New York

tax on the estate of a New York decedent who leaves personal property outside the United States, it is guilty of no more and no less extra-territoriality than is New York. True, the United States does not, like New York, participate in the administration of the estate. Its active intervention is not necessary as is that of New York. It cannot, like New York, contend that it is merely charging for services on the basis of *quantum valebant*. But the *quantum valebant* notion is not the only moral or constitutional prop of the taxing power. Though the succession does not take place through acts *of* the United States as through acts *of* New York, it takes place through acts *in* the United States. As acts *of* the state of domicile may be essential to the transfer of property in other states, so may acts *in* the United States be essential to the passing of property outside the United States. The essential acts for the succession are as territorial to the United States as to the state. As we have seen,[77] the fact that the process of succession occurs in the United States has been held in a number of instances to justify the same kind of taxation as that which may be imposed by a state. It seems clear that there is no more and no less extra-territoriality in a transfer tax than in a privilege tax, when the measure of the tax confines itself to property that is actually embraced in the transfer. If, therefore, we question the constitutional propriety of the imposition by any jurisdiction within whose area the deceased was domiciled, whether the state or the United States, of taxes which are measured by personal property outside that area, we must question both the transfer theory and the bonus theory to the extent that they set themselves up as arbiters of that issue.

This means that we must inquire whether, after all, an inheritance tax is not in common sense a tax either on a person or on property. It is readily conceivable that a tax which purports to be on a subject matter within the jurisdiction may with good reason be regarded by an impartial observer as a tax on some other subject outside the jurisdiction. If Pennsylvania should refuse to probate the will of a Pennsylvania decedent until it received twenty per cent. of the value of a thirty million dollar collection of old masters located in New York and bequeathed to the city of New York, a person with more common sense than knowledge of law might easily be persuaded that Pennsylvania was trying to tax the transfer of property in New York and that such a transfer was not a subject within the jurisdiction of Pennsylvania. He would be fortified

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[77] *Supra*, page

in this persuasion when he learned that, as long as the owner was alive, the pictures could not be taxed by Pennsylvania.[78] This same matter-of-fact person might be likely to assume that the way to find out what was really being taxed is to discover what is the basis for fixing the amount of the tax. He would be encouraged in this assumption if he were told that a tax which calls itself a tax on the privilege of doing business within the state is regarded by the Supreme Court as a tax on property outside the state if its amount is fixed by the value of such property.[79] He would certainly, if the problem attracted him, wish to inquire further into these decisions which seemed to him sensible, and to consider whether the principles which they embody are not equally applicable to inheritance taxation.

Such an inquiry will be made in the next instalment of this discussion. The results of that inquiry will then be applied to the problem of extra-territorial inheritance taxation.

(*To be continued.*)

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[78]Union Refrigerator Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 26 Sup. Ct. 36, *supra,* footnote 3.

[79]Cases cited *supra,* footnote 4.